

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

**ADELA HERNANDEZ,
EDGAR HERNANDEZ**

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CRIMINAL NO. 05-047

Memorandum and Order

Pratter, Gene E.K., D.J.

May 24, 2005

Adela Hernandez moves to allow Alcimar Pernia to testify by telephone at a criminal trial in which Ms. Hernandez is accused of assault on a federal officer and aiding and abetting such assault. For the reasons discussed herein, Ms. Hernandez's motion will be denied.

FACTUAL BACKGROUND

Adela Hernandez and her brother, Edgar Hernandez,¹ are charged with assaulting Officer Marino, a United States Customs and Border Enforcement Officer. The incident giving rise to the criminal charges occurred at the Philadelphia International Airport on December 29, 2004 as Ms. Hernandez and her husband, Jose Sanchez, were proceeding through the customs area at the international air terminal. Ms. Hernandez's husband was detained, and she entered the detention area with him. The Government alleges that Ms. Hernandez attempted to make a telephone call with her cellular telephone, and was informed by the customs agents that the use of cellular telephones was

¹ Edgar Hernandez, the other defendant in this case, joins in the Motion. See Memorandum in Support of Motion to Permit Telephone Testimony at 4.

forbidden in the detention area. Ms. Hernandez is alleged to have then passed her telephone to her brother, Edgar Hernandez, who was also told that use of the telephone was forbidden in the detention area. After receiving the telephone, Edgar Hernandez allegedly pushed Officer Marino, and an altercation ensued in which both Adela Hernandez and Edgar Hernandez were involved.

Ms. Hernandez asserts that Alcimar Pernia is a critical witness to her defense in this case because Ms. Pernia was an eyewitness to the incident. Ms. Pernia, a friend of Ms. Hernandez, is a citizen of Venezuela who has a resident visa allowing her to live in the United States. Ms. Pernia is currently living in Venezuela, and although she is apparently willing to testify,² asserts that she does not want to return to Philadelphia for personal reasons. Ms. Hernandez therefore seeks permission to allow Ms. Pernia to testify during Ms. Hernandez's criminal trial by telephone.

The Government argues that such telephonic testimony should not be permitted for two primary reasons. First, the Government argues that testimony via telephone would be prejudicial to the Government because the jury will be unable to adequately assess Ms. Pernia's credibility, particularly with respect to her body language while testifying. The Government also cites the inability to use exhibits during testimony. In a reply memorandum, Ms. Hernandez disagrees, arguing that the absence of Ms. Pernia's physical presence would be more likely to have a prejudicial effect on the Defendants than on the Government, and suggests that exhibits could be sent to Ms. Pernia via facsimile or overnight delivery for use and reference during her testimony.

The Government secondly argues that such testimony would violate its right under Federal Rule of Criminal Procedure 26 to have testimony presented in open court. While recognizing that the Government is not entitled to a Sixth Amendment right of confrontation, the Government argues that it

² Ms. Pernia speaks fluent English and, if called to do so, indicates that she would testify in English.

is entitled to a fair trial, and that the presentation of telephonic or video telephonic testimony³ is not appropriate in a criminal trial setting. The Government argues that this type of testimony in criminal matters, absent exceptional circumstances, should be precluded.

LEGAL ANALYSIS

Rule 26 of the Federal Rules of Criminal Procedure (“Rule 26”) provides: “[i]n every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-77.” The issue here is whether there can and should be a departure from Rule 26’s straight-forward provision.

The context of this particular Motion is unusual, in that the case law suggests that the admissibility of telephonic evidence is typically challenged by a defendant with the objection that such testimony would be a violation of the defendant’s Sixth Amendment right to confront witnesses. As Ms. Hernandez correctly points out, the Compulsory Process Clause, which provides a defendant the right to compel the presence and present the testimony of witnesses, confers a right that rests solely with a defendant. See Taylor v. Illinois, 484 U.S. 400, 410 (1988); Memorandum Supporting Motion to Permit Telephone Testimony, at 4. However, the Court does not agree with Ms. Hernandez’s assertion that, because she and co-defendant Edgar Hernandez agree to risk the negative prejudice that could result from telephonic testimony, the permission to present such testimony introduces no other fundamental concerns. Rather, the Court believes that allowing telephonic testimony during a criminal trial would impermissibly shortchange the jury, the witness, and the judicial process itself.

The Court has serious concern that allowing a witness to testify by telephone will compromise what the Government refers to as “the solemnity of the federal courtroom,” in that the purpose and

³ No request or proposal for a video presentation – live or pre-recorded – has been presented to the Court.

impact of taking an oath to tell the truth in the physical presence of the jury, the parties, the Court and the public would be dissipated by the absence of Ms. Pernia's physical presence. Not only would the witness's testimony be presented as a disembodied voice, but the Court's and jury's presence would not be "brought home" to the witness. The appearance of casualness in allowing a witness "to phone it in" runs starkly counter to the seriousness of purpose that must attend a criminal trial. The Court additionally agrees that the taking of testimony by telephone would lessen the purpose of cross-examination in that the physical presence of a witness is an important component of the truth-seeking process that is the goal of every trial. Thus, although the Court acknowledges that these Defendants state that they are willing to assume the risk of having Ms. Pernia testify by telephone, it must deny the request because the function of the trial, namely, to pursue the truth of a matter, would be unduly compromised by such a methodology.

The Court also declines to accept Ms. Hernandez's suggestion that the present case is analogous to Federal Rule of Civil Procedure 43, which allows for, upon a showing of good cause, the "presentation of testimony in open court by contemporaneous transmission from a different location." FED. R. CIV. P. 43. Because the interests at stake as well as the burdens and dynamics in a criminal trial sharply differ from those in a civil trial, the Court does not accept the analogy as appropriate under these circumstances.⁴ The suggestion that the Court treat the two rules as "equals" does not appear to be prudent in this case.⁵

⁴ Federal Rule of Criminal Procedure 26 was amended in 2002 to accommodate witnesses who could not present oral testimony and required the assistance of sign language interpreters. See FED. R. CRIM. P. 26, Advisory Committee Notes. This modification reflects the only alteration to conform Federal Rule of Criminal Procedure 26 to Federal Rule of Civil Procedure 43.

⁵ The Court notes that after conducting its own research with respect to the use of telephonic testimony in criminal cases, the only time such testimony appears to have been held to

Even if testimony by telephone were allowable in a criminal trial upon a showing of “good cause,” the Court does not consider the present circumstances to have presented sufficient reason to allow telephonic testimony. In discussing the matter with counsel for all parties, the Court was advised that Ms. Pernia is neither infirm nor under any legal impediment that would prevent her from coming to the United States to testify. As reported to the Court, Ms. Pernia simply would prefer not to travel to the United States to testify. The additional possibilities available via improved technology make Ms. Pernia’s personal preference to avoid live testimony even less sensible, in that the availability of video depositions and live feed video testimony present alternatives to Ms. Pernia’s physical attendance at trial. Although the Government asserts that it would oppose such testimony, the Court has not foreclosed such options were they to be presented as satisfactorily safeguarded solutions and supported by good cause.

CONCLUSION

In summary, the Court sees no reason to allow Ms. Pernia to testify by telephone from Venezuela. The Motion to allow such testimony will therefore be denied. An appropriate Order follows.

Gene E.K. Pratter
United States District Judge

May 24, 2005

be acceptable is during post-conviction proceedings. See, e.g., United States v. McDonald, 53 M.J. 593, 597 (N-M Ct. Crim. App. 2000) (finding that Confrontation Clause does not apply to post-conviction, non-capital pre-sentence proceedings and allowing telephonic testimony); United States v. Libutti, No. 92-611, 1994 WL 774647, at *1 (D.N.J. Dec. 23, 1994) (telephonic testimony of physician taken at pre-sentencing hearing). That is not the situation here and, therefore, these cited cases are not dispositive of the present issue.

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CRIMINAL NO. 05-047

ORDER

AND NOW, this 24th day of May, 2005, upon consideration of the Defendant Adela Hernandez's Motion to Allow Telephone Testimony at Trial (Docket No. 56) , the response thereto (Docket No. 68), the Reply in support of the Motion (Docket No. 69), and after discussing the motion with counsel for all parties, it is ORDERED that the Motion is DENIED.

GENE E.K. PRATTER
United States District Judge